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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA ADAM BARRIES, Defendant and Appellant.	C049732 (Super. Ct. No. SF089898A)

Defendant Joshua Adam Barries appeals following a conviction on one count of conspiracy to commit murder (Pen. Code, §§ 182, subd. (a)(1), 187[1]), three counts of shooting at an inhabited dwelling (§ 246), one count of shooting at an occupied motor vehicle (§ 246), and one count of street terrorism (§ 186.22, subd. (a)). The jury found the conspiracy and shooting offenses were criminal street gang activity. (§ 186.22, subd. (b).) Defendant contends (1) the evidence is insufficient to support conspiracy to commit murder; (2) the trial court

[1] Undesignated statutory references are to the Penal Code.

erroneously instructed the jury regarding accomplices, unjoined perpetrators, and use of a prior trespass for impeachment purposes; (3) two counts should be reversed due to inconsistent verdicts; and (4) the trial court improperly restricted his eligibility for parole. We shall conclude the trial court's comment about parole eligibility was incorrect but does not appear in the abstract of judgment, and therefore no modification of the judgment is necessary. Defendant's other contentions lack merit. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

An information was filed January 26, 2004, against defendant and five other persons (Chaveth Prum, Sokheng Tith, Vanthy Aing, Sinin Long, and Sarann Nuth). The other five persons entered into plea agreements before trial and began serving prison sentences.

The trial proceeded against defendant alone, on the following counts:

Count 1 -- Conspiracy to commit murder (§§ 182, subd. (a)(1), 187) on September 30, 2003, with specified overt acts in furtherance of the conspiracy.

Count 2 -- Shooting at an inhabited dwelling (§ 246) on September 30, 2003, at Coventry Drive in Stockton.

Count 3 -- Shooting at a motor vehicle (1989 Honda) occupied by victim Sophally Kim, at Coventry Drive in Stockton, on September 30, 2003 (§ 246).

Count 4 -- Shooting at an inhabited dwelling (§ 246) on September 30, 2003, at an address on Lorraine Avenue in Stockton.

Count 5 -- Shooting at an inhabited dwelling (§ 246) on September 30, 2003, at an address on Sandalwood Drive in Stockton.

(Counts 6 and 7 were dismissed.)

Count 8 -- Street terrorism (§ 186.22, subd. (a)).

It was also alleged that all of the counts were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). An allegation that defendant personally discharged a firearm (§ 12022.53, subd. (c)) was later stricken at the People's request.

Evidence adduced at trial included the following:

Two nights before the crimes that are the subject of this prosecution, two drive-by shootings occurred. The first was at a Fox Creek address in Stockton, known to be the residence of a member of a street gang, the Loc Town Crips (LTC). A teenage girl in the house was wounded. Residents identified the drive-by car as a red Honda Prelude known to be kept garaged at a Lorraine Avenue residence of a person believed to be a member of a rival gang, the Original Crip Gangsters (OCG). Hours later, gunshots were fired at the Lorraine Avenue address.

The crimes prosecuted in this case involved drive-by shootings at three locations on September 30, 2003. Shortly after 1:00 a.m., Sophally Kim drove his white Honda into the driveway of the apartment complex where he lived on Coventry

Drive. He heard a popping noise, felt a piece of his car hit his head, and realized someone was shooting at him. Police discovered bullet holes in Kim's car, an expended bullet in the trunk, and a bullet casing in the street. Hong Chhet, a resident of a different apartment, was awakened by the gunshots. He heard four or five shots and felt the air stir as two bullets passed close to him. Bullet holes were found inside his apartment and in a window.

The second drive-by shooting, reported at 1:25 a.m., was at the Lorraine Avenue address that had been hit two nights earlier. Anna Mui Si Lay was asleep, at home with her 18-year-old son, Son Nguyen (who sometimes drove her red Prelude), and her 16-year-old daughter, Thuy Nguyen. No one was hit. Live .22-caliber rounds and bullet casings were recovered in the street in front of the house. Bullet holes attributed to the September 30 shooting were concentrated on Lay's house. Police officers had no prior contacts with Son Nguyen as a gang member but did have prior contacts with an OCG gang member who was the boyfriend of Son Nguyen's sister.

The third shooting, on Sandalwood Drive, was reported at 1:28 a.m. Bouaphet Soumpholphakdy lived there with seven members of an extended family, including a 17-year-old nephew. Soumpholphakdy was awakened by the gunfire. Bullets shattered the window of the living room (where his mother slept) and pocked interior walls. Police later recovered seven .22-caliber bullet casings from the scene. Because of prior shootings, the family had mounted a video camera on the front of the house.

The videotape showed a maroon truck with gold trim and a smaller Honda-type vehicle involved in the shooting. While still at the scene, the police received a report of a maroon Dodge truck with gold trim that had been set on fire a few miles from the crime scene. The police found six to 10 .22-caliber casings in the truck after the fire was extinguished.

An investigation led police to defendant (then age 16) and six others -- Chaveth Prum, Sokheng Tith, Samnang Yim, Sinin Long, Vanthy Aing, and Sarann Nuth. The jury heard a tape recording of defendant's statement to the police, in which he admitted that, a week or so before the shootings, he stole the red truck that was later set on fire. Defendant said he was not a member of LTC gang but he "hang[s] around" them. He just "smoke[s] weed" with them and tries not to get involved in the "gun stuff." He initially denied being in the truck when the September 30, 2003, shootings occurred. He then stated he was in the passenger seat when the shootings took place, but he did not shoot. He ducked down because shells were hitting him and he thought someone in a grey Honda Accord fired the first shot at the truck. Defendant then said the shootings occurred because "that other gang" unintentionally shot one of the "home girls" when they shot at a house.

The tape transcript also showed defendant told the police that he and LTC gang members met earlier on the night of the shootings at the levee near Bianchi Road. Defendant said he left to give someone a ride home and then returned. The others "started talking about what they were going to do . . . ."

Then, they were “just driving around” in the truck and a car, with defendant in the front passenger seat of the truck, when they saw a white car driven by an OTC gang member, and defendant heard gun shots being fired by his companions. Also that night, defendant was driving around in the truck, and his companions fired gun shots as they passed “Joe’s house” (on Sandalwood). Defendant went home for a couple of hours, while his companions took the truck for a drive and came back later to pick him up.

Prosecution witness Da Seth testified he is an “associate” (but not a member) of the LTC gang. At the time of trial, he was under supervision of the juvenile probation department due to his commission of various burglaries, auto thefts, and possession of stolen property. Seth testified that, on September 30, 2003, he and defendant were present on the levee with LTC gang members Sinin Long, Samnang Yim, Sokheng Tith, Chaveth Prum, Sarann Nuth, and Dugh Mob (a LTC affiliate) member Vanthy Aing. They were talking about committing drive-by shootings where OCG members lived. Seth testified, “They was [*sic*] planning to go shoot up people that they didn’t like.” One of the targets was “Joe,” who lived on Sandalwood. When asked at trial: “And they wanted specifically to shoot Joe?,” Seth answered, “Yeah.” They wanted revenge for the Fox Creek shooting. When asked if defendant participated in the conversations, Seth said that most of the time defendant was in the car, being quiet, but defendant did get out of the car and talk with the others.

Seth testified he declined to participate, because his cousin lived at one of the target houses. Defendant gave Seth a ride home, while the others went to get more guns. The next day, defendant, in the presence of LTC members, described to Seth how "we" did the shootings.

The jury heard two tape-recorded statements of police interviews with Seth. He testified he was lying in part, but told the truth in the parts consistent with his trial testimony.

Detective Kathryn Stanton testified as an expert on Asian street gangs. LTC is a criminal street gang within the meaning of section 186.22. LTC and OCG are rival gangs. Dugh Mob is an offshoot of LTC. Defendant, Prum, Tith, Long, Nuth, and Yim are LTC gang members. Aing is a member of LTC and Dugh Mob. Defendant and Aing were arrested together in March 2002 for trespassing at Golfland. Seth is not a gang member but associates with gangs.

The expert opined the subject crimes were gang-related. Evidence was adduced that Yim, Tith, Prum, Long, Nuth, and Aing were convicted of gang-related crimes arising out of this case.

The defense case included the following evidence:

One witness saw Seth driving a red and gray pickup truck and handling a gun the day before the crimes and was told by Seth that the truck was stolen.

Defendant's father testified defendant was home at the time of the crimes.

The defense called as a witness Vanthy Aing, who admitted his own participation in the shootings, for which he was now

serving a prison sentence, but said defendant was not involved. Aing testified defendant was not a gang member, was not present on the levee when the shootings were planned, and was not present at the shootings. Aing said Seth did participate in the shootings.

Aing testified he initially lied and told police that defendant was involved in the Lorraine Avenue shooting, because he (Aing) believed defendant had "snitched."

On cross-examination, Aing denied being good friends with defendant. The prosecutor asked whether he and defendant were arrested together for trespassing at Golfland in 2002. Aing admitted it, but said it was just a coincidence that they were both trespassing at the same place at the same time.

Defendant testified. He did not consider himself a gang member but "hang[s] out" with a gang. Defendant admitted he stole the Dodge Dakota truck several days before the subject shootings, but other gang members drove it without his permission. On the night in question, defendant was with Prum, Nuth, Aing, Long, and Seth at the levee, but defendant saw two guns and "didn't want to do the stuff they were talking about," so he went home and stayed home. He was not involved in the shootings or setting fire to the truck. He testified he lied when he told police he participated in the shootings, and he lied because Seth had threatened to kill defendant and his father unless defendant took the blame. Defendant admitted he was good friends with Aing and said they were picked up together, but not arrested, for trespassing at Golfland.

The prosecution's rebuttal witnesses included Tith and Long, who admitted they participated in, and were serving prison sentences for, the shootings. At trial, their memories generally failed them as to their statements to a police detective concerning defendant's participation. Long testified he implicated defendant when talking to the police because he (Long) was mad at defendant.

The detective testified Tith and Long told him defendant drove the truck at all three shootings.

The jury found defendant guilty of conspiracy under section 182 (Count 1) and found true the following overt acts: (1) defendant, Prum, Tith, Yim, Aing, Long, and Nuth were members or associates of the LTC gang; (2) defendant and the others met at the levee and discussed shooting OCG gang members; (3) defendant drove Aing, Long, and Tith in a stolen truck; (4) defendant and the others committed a drive-by shooting upon the occupied vehicle of a suspected gang rival; (5) defendant and the others committed a drive-by shooting upon the Lorraine Avenue residence of a suspected gang rival; (6) defendant and the others committed a drive-by shooting at the Sandalwood residence of a suspected gang rival; (7) defendant and the others burned the Dodge Dakota truck; and (8) the offense was committed by defendant for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote the gang's criminal conduct.

The jury also found defendant guilty of three counts of shooting at an inhabited dwelling under section 246 (Counts 2,

4, and 5), one count of shooting at an occupied motor vehicle under section 246 (Count 3), and one count of "street terrorism" or participation in a criminal street gang under section 186.22 (Count 8).

The jury found defendant committed each crime for the benefit of the criminal street gang within the meaning of section 186.22.

As reflected in a second amended abstract of judgment (following rejection of housing by the California Youth Authority), the trial court sentenced defendant to four consecutive terms of 15 years to life on Counts 2, 3, 4, and 5 (shooting at inhabited dwelling or vehicle), and a concurrent two year term for street terrorism (Count 8). The court imposed but stayed sentence (25 years to life) on Count 1, conspiracy to commit murder, pursuant to section 654.

Defendant appeals.

DISCUSSION

I. Substantial Evidence

Defendant contends no substantial evidence supports his conviction for conspiracy *to commit murder*. He claims the evidence at most shows a conspiracy to commit drive-by shootings of houses. We disagree.

Our task is to determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving defendant guilty beyond a reasonable doubt, with evidence of solid value that reasonably inspires confidence. (*People v. Morris* (1988) 46 Cal.3d 1, 19.) We review the record

in the light most favorable to the judgment, including reasonable inferences to be drawn from the evidence. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Johnson* (1980) 26 Cal.3d 557, 576, 578.)

Conspiracy to commit murder is necessarily conspiracy to commit first degree murder. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1231-1232.) Thus, a conviction of conspiracy to commit murder requires a finding of intent to kill and cannot be based on a theory of implied malice. (*People v. Swain* (1996) 12 Cal.4th 593, 607.)

Defendant argues the only intent shown by the evidence was the intent to commit drive-by shootings, a violation of section 246, which is a general intent crime. (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1356.) Defendant notes section 246 requires only an intent to shoot at a building; it does not even require an intent to strike the building.

Defendant claims, "No one testified that the LTC members ever discussed killing or agreed to *kill* OTC members." Defendant is wrong.

Thus, Da Seth testified he and defendant were present on the levee when the others were "planning to go shoot up people that they didn't like." They wanted to get revenge on the OCG gang for the prior incident in which OCG injured a girl who was friendly to LTC. At trial, Seth answered, "Yeah" when asked whether they "wanted specifically to shoot Joe" (who lived at the Sandalwood address and was considered responsible for the

girl's injuries). This testimony was consistent with Seth's prior statement to the police.

Additionally, the evidence showed the perpetrators fired guns at Sophally Kim when they encountered him in his car outside of his residence. Even if it were happenstance that Kim was outside rather than in his residence, the evidence supports the inference that the conspiracy involved an intent to kill.

This evidence suffices to support the conviction for conspiracy to commit murder, regardless of the presence of some opposing evidence, such as Aing's testimony that the shooting at Joe's house was not discussed on the levee but was a later spontaneous decision.

We therefore need not address the People's argument that intent to kill all persons within the residences may be inferred based on "the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons . . . ." (*People v. Vang* (2001) 87 Cal.App.4th 554, 563-564.)

Defendant summarily claims, without citation of authority, that the prosecutor's election not to charge him or his co-defendants with attempted murder shows the prosecutor recognized there was no conspiracy to commit murder. The contention is meritless on its face.

We conclude substantial evidence supports the conviction for conspiracy to commit murder.

II. Accomplice Instructions

Defendant contends the trial court prejudicially erred and violated his constitutional rights by telling the jury that he

and three witnesses (Aing, Tith, and Long) were accomplices as a matter of law, and by giving other accomplice instructions. We review this contention despite defendant's failure to raise it in the trial court. (§ 1259.) We shall explain defendant fails to show grounds for reversal.

First, defendant is incorrect in his assertion that the jury was instructed the witnesses were accomplices *of defendant*. Rather, the court told the jury: "If the crimes charged were committed by anyone, . . . the witnesses . . . Vanthy Aing, Sokheng Tith, and Sinin Long were accomplices as a matter of law . . . ." This instruction is correct. Aing, Tith, and Long -- all of whom are serving prison sentences for the shootings that are the subject of this case (as the jury was informed) -- were accomplices of each other, independent of any involvement of defendant. Nothing in this instruction or the other jury instructions suggested the witnesses were accomplices *of defendant* or that defendant participated in any crimes.

Thus, the full jury instructions regarding accomplices were as follows:

"An accomplice is a person who is or was subject to prosecution for the identical offenses charged against the defendant on trial by reason of aiding and abetting or being a member of a criminal conspiracy.

"You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense.

“Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated out of court was true.

“To corroborate the testimony of an accomplice, there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged.

“However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged or that it corroborate every fact to which the accomplice testifies.

“In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime.

“If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated.

“If there is independent evidence which you believe, then the testimony of the accomplice is corroborated.

“The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his accomplices but must come from other evidence.

"Defendant's own testimony and inferences therefrom may be sufficient corroborative testimony.

"If the crimes charged were committed by anyone, the . . . witnesses . . . Vanthy Aing, Sokheng Tith, and Sinin Long were accomplices as a matter of law and their testimony is subject to the rule requiring corroboration.

"To the extent that an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves, after examining it with care and caution and in the light of all the evidence in this case."

The court further instructed that the jury must determine whether witness Da Seth was an accomplice, and defendant had the burden of proving by a preponderance of the evidence that Da Seth was an accomplice.

Thus, nothing in the jury instructions suggested the witnesses were accomplices (or co-conspirators) *of defendant* or that defendant participated in the crimes. The instructions said the witnesses were accomplices *to the crime* (not to defendant), and only *if the jury determined a crime had been committed*. We therefore reject defendant's argument that the trial court, by instructing the jury that Aing, Tith, and Long were accomplices, in effect told the jury that defendant was an aider and abettor and co-conspirator.

Similarly meritless is defendant's argument that "[O]nce the jury knew, through the instruction, that the admittedly

guilty Aing, Tith, and Long were in fact accomplices -- obviously of appellant -- there was no issue left for the jury to decide regarding appellant's guilt. In the context of this case and the instructions, the *only* person of whom they could have been accomplices was appellant." This argument is just plain wrong. In the context of the instructions, Aing, Tith, and Long were accomplices of each other. (Even assuming the trial court should have omitted Aing's name because he was a defense witness, which we discuss *post*, Tith and Long were accomplices of each other.) Thus, the instructions did not suggest that defendant was an accomplice.

Defendant cites several cases, none of which supports his appeal. He claims to paraphrase from *People v. Valerio* (1970) 13 Cal.App.3d 912, 924 (*Valerio*), with brackets inserted by defendant, that "'[i]f the trial court instructed the jury that [Aing, Tith, and Long were] accomplices as a matter of law, he would, in effect, be instructing the jury that [they were] guilty of the offense charged, thereby invading the province of the jury with respect to the determination of [appellant's] guilt or innocence.'" This misstates *Valerio*. What *Valerio* actually said was that "[i]f the trial court instructed the jury that *the codefendant* was an accomplice as a matter of law, he would, in effect, be instructing the jury that *the codefendant* was guilty of the offenses charged, thereby invading the province of the jury with respect to the determination of *her* [*the codefendant's*] guilt or innocence." (*Id*. at p. 924, italics and brackets added.) *Valerio* rejected the defendant's

argument that the trial court erred by allowing the jury to decide whether the codefendant was an accomplice instead of instructing that she was an accomplice as a matter of law. (*Ibid*.)

Thus, the cited portion of *Valerio, supra,* 13 Cal.App.3d 912, concerned itself with protecting the presumption of innocence of *the codefendant* (whose testimony admitted possession of marijuana but claimed defendant gave it to her to hold). (*Id*. p. 918.) Here, the witnesses were not accused codefendants. They had already "pleaded to" and were serving prison sentences for the shootings, and the jury was informed of these facts. *Valerio* is of no assistance to defendant.

Defendant next quotes from *People v. Bittaker* (1989) 48 Cal.3d 1046 (*Bittaker*), which is more similar to the facts of this case, but which still does not help defendant. There, one Roy Norris testified for the prosecution pursuant to a plea bargain under which he pled guilty to the murders for which Bittaker was on trial. (*Id*. at p. 1063.) At Bittaker's trial, Norris testified they committed the crimes together. (*Ibid*.) The trial court instructed the jury that Norris was an accomplice as a matter of law, and his testimony required corroboration. The *Bittaker* court's entire discussion on this subject was as follows: "This instruction was legally correct. We have, however, cautioned that 'where a codefendant has made a judicial confession as to crimes charged, an instruction that as a matter of law such codefendant is an accomplice of other defendants might well be construed by the jurors as imputing the

confessing [codefendant's] foregone guilt to the other defendants.' [Citations.] Under the circumstances of this case, however, there is no significant danger that the jury would impute Norris's admitted guilt to defendant." (*Id*. at p. 1100, citing cases including *Valerio*.)

Here, too, we see no significant danger that the jury would impute the admitted guilt of Aing, Tith, and Long, to defendant. Thus, *Bittaker* does not support reversal of the judgment in this case.

Bittaker, supra, 48 Cal.3d 1046, cited *People v. Richardson* (1960) 182 Cal.App.2d 620, which also involved codefendants, who appealed separately. The trial court instructed the jury on the need for corroboration of accomplice testimony. On appeal, Richardson asserted error in the trial court's failure to instruct on its own motion that codefendant Mason (whose trial testimony incriminated himself and Richardson) was an accomplice as a matter of law. (*Id*. at p. 623.) The appellate court noted that, since Mason was a codefendant, the usual form of the instruction "might well be claimed to assume the guilt of one or both defendants." (*Ibid*.) However, the appellate court said it did not need to discuss the point, because prejudice was clearly lacking, in that the jury found Mason guilty. Thus the jury clearly found Mason to be an accomplice and must be assumed to have followed the instructions on the need for corroboration. (*Ibid*.)

Bittaker, supra, 48 Cal.3d 1046, also cited *People v. Hill* (1967) 66 Cal.2d 536, where defendants Hill, Saunders, and

Madorid were jointly tried and convicted. On the appeal of Hill and Saunders, they argued the trial court erred in instructing the jury in a manner that permitted it to conclude that Madorid was an accomplice as a matter of law. (*Id*. at p. 555.) The Supreme Court said, "where a codefendant has made a judicial confession as to crimes charged, an instruction that as a matter of law such codefendant is an accomplice of other defendants might well be construed by the jurors as imputing the confessing defendant's foregone guilt to the other defendants [citing *Richardson, supra*, 182 Cal.App.2d at p. 623]. It is not error even to forego the giving of accomplice instructions where the giving of them would unfairly prejudice a codefendant in the eyes of the jury. [Citations.] In the instant case it was not error to leave to the jury the determination of Madorid's role as an accomplice and thus avoid imputations of the guilt of Hill and Saunders which might have flowed from the court's direction that the confessing Madorid was their accomplice as a matter of law." (*Hill, supra*, 66 Cal.2d at pp. 555-556.) *Hill* continued: "In any event, no prejudice could have resulted as the jury found Madorid guilty of the identical crimes as Hill and Saunders. Thus, it clearly found him to be an accomplice [citation], and we may presume that it followed the proper instructions to find corroboration [and there was substantial evidence of corroboration]." (*Id*. at p. 556.)

Here, too, no prejudice could have resulted. Those serving prison sentences for the shootings were clearly accomplices to the shootings. We conclude the instructions that Aing, Tith,

and Long were accomplices as a matter of law did not take from the jury the factual question whether defendant was involved in the crimes.

As to Aing, however, another issue exists, because Aing was called as a defense witness, not a prosecution witness. Defendant cites authority that the instruction requiring corroboration of accomplice testimony should not be given when the witness has been called as a defense witness and provides testimony exculpatory to the defendant. (E.g., *Cool v. United States* (1972) 409 U.S. 100 [34 L.Ed.2d 335].)

Here, however, Aing's statements were not entirely exculpatory. At trial, he admitted he told the police that defendant was involved in the Lorraine Avenue shooting. He testified at trial that his statement to the police was a lie. However, that was for the jury to decide, and if the jury decided Aing's statement to the police was truthful, then defendant would benefit from the instruction that such incriminating evidence required corroboration. As we have recounted, the jury was instructed that only "testimony that tends to incriminate the defendant" should be viewed with caution.

None of the authorities cited by defendant supports his position that the trial court erred by failing to instruct the jury *sua sponte* that Aing's testimony could form the basis of a not-guilty verdict.

None of the authorities cited by defendant supports reversal of the judgment in this case. Thus, for example, *Cool*

v. United States, supra, 409 U.S. 100, held that where the defendant relied primarily on the exculpatory testimony of an alleged accomplice, it was reversible error for the trial court to instruct the jury that, if the jury was convinced of the accomplice's truthfulness "beyond a reasonable doubt," the jury should give the testimony the same effect as testimony of a witness not implicated in the crime. (*Id*. at p. 102.) The Supreme Court said that, although the instruction was couched in positive terms, it contained a negative pregnant suggesting the jury was to reject the evidence if they had a reasonable doubt as to its veracity, and thus interfered with the defendant's Sixth Amendment right to present exculpatory testimony of an accomplice and reduced the prosecution's burden of proof. (*Id*. at pp. 102-103.) Here, no such instructional error occurred.

Defendant also cites *People v. Provencio* (1989) 210 Cal.App.3d 290 (*Provencio*), where a defense witness (Doldo) testified he committed the burglaries for which Provencio was on trial, he (Doldo) had pled guilty to them, and Provencio did not participate in any fashion. (*Id*. at p. 298.) On rebuttal, a police detective testified Doldo stated after his arrest that he and Provencio committed the crimes together. (*Id*. at p. 299.) On appeal, Provencio argued the trial court was required to instruct the jury sua sponte that Doldo's prior inconsistent statement required corroboration because the statement, if believed, would make Doldo an accomplice of Provencio as a matter of law. (*Id*. at p. 308.)

Provencio, supra, 210 Cal.App.3d 290, said, "there is no duty on the trial court to give instructions on accomplice testimony when the defense calls the witness to testify on its behalf and that witness gives self-interested testimony unfavorable to the defense. [Citation.] Because the defendant is powerless to offer an inducement of leniency to the witness, the same rationale for requiring accomplice instructions for close scrutiny of such testimony when the prosecution calls the witness does not apply when the defense calls the witness. [Citation.] [¶] Under these principles, and the facts in this case, absent a defense request for a finely tailored jury instruction limited to Doldo possibly being regarded as an accomplice concerning his earlier statements to [the detective], the trial court did not err in failing to instruct sua sponte that Doldo's prior inconsistent statements required corroboration." (*Provencio, supra*, 210 Cal.App.3d at pp. 308-309.) *Provencio* said, "the mere presence of potentially incriminating out-of-court statements of a defense witness who denies accomplice status, does not give rise to a sua sponte duty to instruct the jury concerning accomplice testimony when the witness is called to testify for the defense. Rather a question of credibility for the jury to determine arises concerning the weight to be given to such statements." (*Id*. at pp. 308-309.)

Thus, *Provencio, supra,* 210 Cal.App.3d 290, has no bearing on the case before us.

Defendant fails to show any prejudice from the instructions. He argues prejudice was "inherent" and, to ensure that the jurors would not apply the corroboration requirement to Aing's exculpatory testimony, the trial court should have instructed the jury that it could *acquit* defendant on the basis of accomplice testimony. However, as we have said, the instructions limited the need for corroboration to *incriminating* evidence, i.e., "You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense." The federal cases cited by defendant do not help him, because they involved federal courts where jurors were instructed that accomplice testimony should be viewed with caution generally (without limiting the caution to testimony *incriminating* the defendant) and could be used to convict without corroboration. (*United States v. Armocida* (3d Cir. 1975) 515 F.2d 29, 48; *United States v. Morrone* (D.C. Pa. 1980) 502 F.Supp. 983, 993.)

Defendant also argues he was prejudiced because the prosecutor in closing argument said the jurors would have to decide whether Da Seth was an accomplice that (according to defendant) highlighted the fact the jury did not have to decide whether Aing, Tith, and Long were accomplices because the trial court had already made that determination. This does not constitute prejudice.

We conclude defendant fails to show any reversible error regarding accomplice instructions.

III. Instructions Re: Unjoined Perpetrators

Defendant contends the trial court erred by instructing the jury with CALJIC No. 2.11.5 regarding unjoined perpetrators. We consider this argument despite defendant's failure to raise it in the trial court (§ 1259), but we conclude the argument lacks merit.

The trial court instructed the jury with CALJIC No. 2.11.5, as follows:

"There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial. There may be many reasons why that person is not here on trial. Therefore, do not speculate or guess as to why the other person is not being prosecuted in this trial or whether they have been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendant on trial."

Defendant says the "use note" to this jury instruction indicated, "Do not use this instruction if the other person is a witness for either the prosecution or the defense."

The California Supreme Court has said: "'CALJIC No. 2.11.5 . . . should not be given when a nonprosecuted participant testifies because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 153, 226.)

Defendant complains the instruction in effect removed from the jury's consideration Aing's testimony that defendant was not

involved in the shootings and impeded the defense that others, not defendant, actually committed the charged offenses.

Defendant also complains some witnesses may have had a motive to testify in conformity with the prosecution's case, but the instruction "could very well have had the effect of misleading the jury into disregarding relevant evidence of this motive and bias, as well as the witnesses' moral turpitude, which seriously affects their credibility." Specifically, defendant refers to the prosecution's rebuttal witnesses. Defendant says Tith pled to at least some of the charges and then testified he told the police that defendant had been driving the truck the evening of the crimes, but Tith claimed not to remember whether defendant was present at the shootings. Defendant further says Seth, who may have been involved but was never charged, provided significant evidence against defendant, and the prosecutor in closing argument to the jury said: "I submit to you, ladies and gentlemen, Da Seth was never arrested because he was never at any of these shootings. His -- his statements are the truth, what he told the police, and that the police actually believed him, after some grueling interrogation did not arrest him." Defendant further says Long was convicted of shooting and provided strong prosecution evidence, stressed by the prosecutor in closing argument to the jury. Defendant argues Seth, Long, and Tith certainly may have had a motive to testify in conformity with the prosecution's case, but the instruction could very well have had the effect of misleading the jury into disregarding relevant evidence of this motive and

bias, as well as the witnesses' moral turpitude, which seriously affected their credibility.

However, defendant cites no authority reversing a judgment on these facts. To the contrary, case law shows such error is generally considered nonprejudicial as long as the instruction is given with the full panoply of witness credibility and accomplice instructions (as it was in this case).

Thus, in *People v. Jones* (2003) 30 Cal.4th 1084, the California Supreme Court observed that it has often said, "trial courts should not give CALJIC No. 2.11.5 in an unmodified form when, as here, a person who might have been prosecuted for the crime has testified at trial. [Citations.] The impact of this mistaken instruction, however, was ameliorated because the court gave proper instructions that in assessing the credibility of witnesses the jury could consider '[t]he existence or nonexistence of a bias, interest, or other motive' and '[t]he witness' prior conviction of a felony.' (CALJIC No. 2.20.) The jury was again instructed: 'The fact that a witness has been convicted of a felony . . . may be considered . . . only for the purpose of determining the credibility of the witness.' (CALJIC No. 2.23.) Finally, the jury was told that the testimony of an accomplice should be viewed with mistrust. (CALJIC No. 3.18.) Relying on these instructions, defense counsel argued that the jury should not credit the testimony of [two witnesses] because it was given to obtain favorable plea bargains. The prosecutor raised no objection. We [the California Supreme Court] have declined to label a mistake in the giving of CALJIC No. 2.11.5

as error when, as here, 'the instruction is given with the full panoply of witness credibility and accomplice instructions.' [Citation.]" (*Jones, supra*, 30 Cal.4th at pp. 1113-1114.)

In *People v. Fonseca* (2003) 105 Cal.App.4th 543, the Fifth Appellate District said, "the potentially prejudicial effect of [CALJIC No. 2.11.5] in the context of the testifying unjoined coperpetrator lies not in the instruction itself, but in the rather remote possibility that the trial court would fail to give otherwise pertinent and required instructions on the issue of witness credibility. [Citations.] There is no error in giving CALJIC No. 2.11.5 so long as a reasonable juror, considering the whole of his or her charge, would understand that evidence of criminal activity by a witness not being prosecuted in the current trial should be considered in assessing the witness's credibility. [Citation.]" (*Id*. at pp. 549-550.)

We conclude defendant fails to show reversible error concerning CALJIC No. 2.11.5.

IV. Trespass at Golfland

Defendant argues the trial court erred in instructing the jury that defendant's 2002 trespass at Golfland could be used as a reason to disbelieve him and Aing. Defendant argues trespass is not a crime of moral turpitude and therefore cannot be used for impeachment purposes. Even assuming the jury should not have been so instructed, and even assuming the contention is not forfeited by defendant's failure to request a limiting

instruction in the trial court, we shall conclude defendant fails to show grounds for reversal.

Defendant acknowledges the applicable standard of review is the standard for reviewing ambiguous jury instructions, i.e., whether there is a reasonable likelihood that the jury would have misinterpreted the instructions in a way that violates the Constitution. (*People v. Clair* (1992) 2 Cal.4th 629, 663, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385].)

At trial, the gang expert testified defendant is a member of the LTC gang, an opinion she reached based on matters such as the crimes he has committed with LTC members, statements of other people saying he is a member, his statements to others about being made a member, and prior contacts with LTC members, specifically Vanthy Aing. When asked how long defendant had been an LTC member, the expert testified:

"A. We have contacts of him affiliating with LTC since 2002. Information that I have obtained from other people is that he began becoming a member approximately six months before these crimes happened, or a year before these crimes happened. Or that's when he started hanging around and becoming a -- more involved with them. [¶] He's also claimed to hang out with LTC later on, in past contacts.

"Q. Is there a particular incident where he and one of the other individuals you identified as an LTC gang member by the name of 'Vanthy Aing,' did they have a particular incident where they were arrested together?

"A. Yes, they did.

"Q. Do you remember what that was?

"A. They were arrested for trespassing at Golfland.

"Q. And do you know when that was?

"A. That was -- it would have been in March of 2002."

At trial, Aing testified as a defense witness. He admitted his own participation in the shootings, denied that defendant was there, and denied that defendant was a gang member. On cross-examination, the prosecutor asked Aing if he was testifying favorably to defendant out of friendship. Aing said, "We ain't friends like, you know. Just seeing him in the neighborhood and talk to him and stuff." The prosecutor asked if it was true that Aing and defendant were arrested together for trespass at Golfland in 2002. Aing said yes but it was just a coincidence that they both happened to be trespassing at the same place at the same time.

The trial court instructed the jury that "[i]n determining the believability of a witness, you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to . . . [¶] Past criminal conduct of a witness amounting to a misdemeanor."

The trial court also instructed the jury pursuant to CALJIC No. 2.23.1: "Evidence has been introduced for the purpose of showing that a witness, Vanthy Aing and [defendant] engaged in past criminal conduct amounting to a misdemeanor. This evidence may be considered by you only for the purpose of determining the

believability of that witness. The fact that the witness engaged in past criminal conduct amounting to a misdemeanor, if it is established, does not necessarily destroy or impair a witness' believability. It is one of the circumstances that you may consider in weighing the testimony of that witness. [¶] Trespass is a misdemeanor."

In his argument to the jury, the prosecutor said: "I asked [witness] Detective Rodriguez about Vanthy Aing, whether he had -- in his conversation or interview with Vanthy Aing, whether Vanthy Aing -- who, by the way, said that he was a good friend of the defendant and also the defendant when he got on the stand said that he and Vanthy Aing had been friends for a long time. And there's also -- to digress a second, there's also an indication that the defendant and Vanthy Aing a couple of years ago were caught trespassing in Golfland . . . , and that is a misdemeanor, there's an instruction on that, and you -- it also tells you what to do with that particular information and you can weigh it against everything else."

Defense counsel, in closing argument to the jury, discussed the gang expert's testimony that defendant is a gang member and said he asked the expert how it occurred, and she said defendant trespassed with Aing some years ago. Defense counsel argued to the jury that trespass was "nothing, it's a zilch," and, "That's not the type of thing -- it's not a moral turpitude concept in which you would be privileged to value the quality of his evidence."

In rebuttal, the prosecutor argued to the jury that defense counsel said the gang expert "made the defendant a gang member because he was caught in Golfland down there with Vanthy Aing a couple of years ago, trespassing. [¶] That's not what that testimony was about. That's not what that evidence was about. [¶] [The expert] told you the significance of the defendant being with Vanthy Aing is that he was with Vanthy Aing. Their friendship goes back a couple of years. Vanthy Aing's a gang member. The defendant's a gang member. Whether or not they committed a trespass or they were eating a snow cone, it makes no difference. The fact that they were with one another is the significance of that particular testimony."

On appeal, defendant in effect admits the trespass could be used to discredit his denial of association with gang members. He complains the jury instructions permitted the jury to use the evidence for "an additional, but improper purpose" -- to discredit all of his and Aing's testimony. He argues trespass does not involve moral turpitude and therefore should not be used for general impeachment.

However, even assuming trespass should not be used for general impeachment, defendant failed to request a limiting instruction, which generally constitutes a forfeiture of the matter. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052.)

Even assuming defendant has not forfeited the contention, he fails to show grounds for reversal. Thus, the prosecutor told the jury he was using the trespass for a limited purpose --

to disprove the denial of a friendship between defendant and gang member Aing. Moreover, there was substantial evidence of defendant's guilt.

We conclude it is not reasonably likely that the jury would have misinterpreted the instructions in a way that violates the Constitution.

V. Claim of Inconsistent Verdicts

Defendant contends Count 1 (conspiracy to commit murder) and Count 3 (shooting at the occupied car) should be reversed, because the jury foreperson signed inconsistent verdicts finding defendant guilty and not guilty on these two counts.

The "not guilty" verdict forms appear in the clerk's transcript following a title page labeled, "VERDICT(S) NOT USED." The "not guilty" forms have the jury foreperson's apparent signature "blacked-out," and "JN. 05" typewritten in white placed on top of the black-out. Each form is dated "12/17/04," but one form has a drawn line crossing out the date. As noted by the People, for all we know, the foreperson may have crossed out his or her signatures before they were blacked out. We agree with the People that it appears inferentially that the jury foreperson accidentally filled out the wrong forms, corrected the mistake, and placed the discarded forms in the "not used" pile.

Defendant argues he should be given the benefit of any doubt. However, there is no doubt here. When the jurors returned to the courtroom and gave the court the guilty verdicts, the jurors were polled. Each juror stated the

verdicts were their true verdicts. Additionally, as to the conspiracy in Count 1, the jurors returned verdicts finding true several of the alleged overt acts in furtherance of the conspiracy, and affirmed these findings during the polling.

The People cite *People v. Thornton* (1984) 155 Cal.App.3d 845 (*Thornton*), where a jury filled out verdict forms finding the defendant not guilty of the principal offense (possession of controlled substance for purposes of sale) but guilty of the lesser included offense of simple possession. The trial court inadvertently read only the not-guilty verdict in open court and then discharged the jury. There was no reading, acknowledgement, or recordation of the verdict on the lesser offense. Upon discovering its error, the trial court reconvened the jury the next day, polled the jurors, and entered the guilty verdict on the lesser offense. Citing sections 1149[2] and 1164,[3]

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[2] Section 1149 states: "When the jury appear [with the verdict] they must be asked by the court, or clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same." (§ 1149.)

[3] Section 1164 provides in part: "When the verdict given is receivable by the court, the clerk shall record it in full upon the minutes, and if requested by any party shall read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall, subject to subdivision (b), be discharged from the case.

"(b) No jury shall be discharged until the court has verified on the record that the jury has either reached a verdict or has formally declared its inability to [do so] . . . ." (§ 1164, subds. (a), (b).)

the Second Appellate District reversed, holding the trial court erred in reconvening the jury, and the mere turning in of the guilty verdict, without unanimous endorsement by the jurors in open court, could not stand.

The People quote from *Thornton, supra,* 155 Cal.App.3d 845:

"Other cases have dealt with the situation where the verdict form signed by the jury is different in some respect from the verdict as declared and acknowledged by the jury in open court. In *People v. Lankford* (1976) 55 Cal.App.3d 203, the verdict form was apparently signed and dated before one of the original jurors had been replaced by an alternate. When the verdict was orally acknowledged in court, however, it was done so by the 11 remaining original jurors plus the alternate. In response to the defendant's claim that the verdict was defective in that the alternate had not participated in it, the court held there was no error because the 'true verdict' was the one acknowledged in open court with participation of the alternate: 'The oral declaration of the jurors endorsing the result is the true return of the verdict.' [Citation.]

"Similarly, in *People v. Mestas* (1967) 253 Cal.App.2d 780, 786, the court stated, 'while it is established custom in modern practice for the court to submit verdict forms to the jury, *the oral declaration by the jurors unanimously endorsing a given result is the true "return of the verdict" prior to the recording thereof.*' Thus, the court held that although the jury initially turned in signed and dated verdict forms purporting to find the defendant both guilty and not guilty, there was no

error in immediately sending them back for further deliberations and subsequently allowing them to return and acknowledge only the guilty verdict, because the mere turning in of the verdict forms did not constitute a 'true return' of any verdict.

"We conclude that the mere turning in of the guilty verdict in this case cannot support a judgment of guilt. Thus in accordance with *Lankford* and *Mestas*, the only true verdict was the one finding appellant not guilty of the charged offense, since that was the only verdict unanimously endorsed by the jurors in open court. We recognize that the guilty verdict form on the lesser included offense conflicted with the 'not guilty' verdict since a not guilty verdict, absent deadlock on lesser included offenses, generally implies acquittal of all lesser offenses included in the one charged. [Citation.] However, where two verdicts are conflicting (*Mestas*) or otherwise nonidentical (*Lankford*) and only one of them is orally acknowledged by the jurors, the acknowledged verdict is the only 'true' one and therefore the only one upon which judgment can be rendered." (*Thornton, supra*, 155 Cal.App.3d at pp. 857-858.)

Defendant replies *Thornton, supra,* 155 Cal.App.3d 845, is not on point because it expressly stated, "It is not necessary and we therefore do not decide the question of whether a defendant is entitled to a remedy where the jury, unanimously intending to acquit him or her, mistakenly completes a guilty verdict." (*Id*. at p. 856, fn. 3.)

Nevertheless, defendant has no reply to the *Mestas* case (*People v. Mestas* (1967) 253 Cal.App.2d 780 (*Mestas*)), which was

discussed in *Thornton, supra,* 155 Cal.App.3d 845, and which is helpful to the case before us. In *Mestas*, the jury actually returned both verdicts -- guilty and not-guilty -- and the appellate court saw no problem with the trial court sending the jury to sort it out and come back with the guilty verdict. Here, the jury did not even try to return inconsistent verdicts to the court. Rather, the not-guilty verdict forms appear in the record only in a pile with the "not used" verdict forms.

Defendant says *Thornton, supra,* 155 Cal.App.3d 845, said, "a defective verdict of acquittal cannot be reconsidered," which implies a defective verdict of guilt may be reconsidered. The point does not assist defendant because he fails to show a defective verdict of guilt.

We conclude defendant fails to show grounds for reversal based on inconsistent verdicts.

VI. Sentencing

Defendant argues the record should be corrected to remove the restriction imposed by the trial court that defendant serve a minimum sentence of 15 years before he is eligible for parole. We shall conclude the trial court's comment, applying the restriction to the section 246 convictions, was incorrect but was not incorporated into the judgment, and therefore there is no need to modify the judgment.

Section 186.22, subdivision (b),[4] authorizes additional punishment for felonies committed by/for criminal street gangs. Section 186.22, subdivision (b)(4),[5] authorizes the 15-years-to-life sentence imposed by the trial court for gang-related section 246 drive-by shootings.

In sentencing defendant on the four counts of shooting at an inhabited dwelling or motor vehicle (§ 246), the trial court noted the jury also found defendant committed these felonies for the benefit of a criminal street gang under section 186.22, subdivision (b)(1), and the court stated, "Pursuant to Penal

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[4] Section 186.22, subdivision (b)(1), states, "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as [specified]." (§ 186.22, subd. (b)(1).)

[5] Section 186.22, subdivision (b)(4), provides in part: "Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including [applicable] enhancements . . . if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph.

"(B) Imprisonment in the state prison for 15 years, if the felony is . . . a felony violation of Section 246 . . . ." (§ 186.22, subds. (b)(4)(A), (B).)

Code Section 186.22, subsection, or I should say paragraph (4)(a)(b) [*sic*], these felonies each are punishable by imprisonment for life. [¶] Therefore, as to each of these felonies, you will not be eligible for parole until a minimum of 15 years have been served."

Section 186.22's parole eligibility restriction used to appear in subdivision (b)(4), but an amendment in 2000 moved the restriction to subdivision (b)(5), which states: "Except as provided in paragraph (4) [fn. 4, *ante*], any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." (§ 186.22, subd. (b)(5); Stats. 1997, ch. 500, § 2; Ballot Pamp., Primary Elec. (March 7, 2000) text of Prop. 21, § 4, pp. 3-7.)

This parole restriction in section 186.22, subdivision (b)(5), is limited to crimes where the underlying felony itself, by its own terms, provides for a term of life imprisonment. (*People v. Montes* (2003) 31 Cal.4th 350 [parole restriction did not apply where the defendant committed a felony which, together with a section 12022.53 enhancement, resulted in a life term]; see also, *People v. Florez* (2005) 132 Cal.App.4th 314, 317, 322-323 [appellate court summarily agreed with the parties that the sentence imposed upon the conviction for discharging a firearm at an inhabited dwelling, committed for the benefit of a criminal street gang, should be modified to reflect that the sentence was imposed under section 186.22, subdivision (b)(4),

and was not subject to the 15-year-minimum parole eligibility restriction of section 186.22, subdivision (b)(5)].)

Section 246 itself authorizes felony sentencing of three, five, or seven years; it does not authorize a term of life imprisonment.

Defendant argues the trial court improperly imposed the 15-year minimum parole eligibility period "[i]n apparent reliance" on subdivision (b)(5) of section 186.22. The People agree with defendant that subdivision (b)(5) of section 186.22 does not apply to section 246 offenses. (See *People v. Lopez* (2005) 34 Cal.4th 1002, 1104; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.)

However, the People suggest that, because the trial court did not cite subdivision (b)(5) of section 186.22, the court did not rely on that statutory provision. The People maintain the parole restriction is correct based on indeterminate sentencing considerations generally. The People cite authorities regarding restriction of prison worktime credits under the three strikes law.

We disagree with the People's suggestion that the trial court did not rely on section 186.22. Clearly, the court viewed section 186.22 as the source of the parole restriction, though the court got the subdivision wrong.

We conclude the trial court's comment -- that section 186.22 imposed a parole restriction on defendant's section 246 convictions -- was incorrect. Nevertheless, the comment was not reported on the abstract of judgment. We assume the parole

authorities will comply with any parole restrictions imposed by law. There is nothing for us to do.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

We concur:

ROBIE, J.

BUTZ, J.